NATIONAL RAILROAD ADJUSTMENT BOARD
Third DIVISION

Form 1

Award No. 31867
Docket No. MW-30810
96-3-92-3-609

The Third Division consisted of the regular members and in addition Referee Dana E. Eischen when award was rendered.

PARTIES TO DISPUTE: (Brotherhood of Maintenance of Way Employes
(
(CSX Transportation, Inc. (former
(Seaboard System Railroad)

STATEMENT OF CLAIM: "Claim of the System Committee of the Brotherhood that:

(1) The Carrier violated the Agreement when it assigned outside forces (E&M Services of Dillon South Carolina) to perform Maintenance of Way work (reconstructing road crossings) near Mile Posts SA 46.4, SA 54.3 and SA 49.1 on the Portsmouth Subdivision of the Florence Division on July 13, 17, and 27, 1990 [System File 90-102/12(91-70) SSY].

(2) The Carrier also violated Rule 2 when it failed to confer with the General Chairman in good faith in order to reach an understanding prior to contracting out the work in question.

(3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Foreman M. C. Thomason, Assistant Foreman J. T. McGee, Class III Machine Operator R. Bradley and Trackmen L. A. Artis, T. L. Boykins, Jr. and L. D. Davis shall each `be allowed pay for an equal proportionate share of one hundred fifteen (115) straight time hours at their respective rates of pay and twenty-five (25) time and one-half hours at their respective rates of pay for the man-hours expended by the contractor's forces performing the subject work.'"

FINDINGS:

The Third Division of the Adjustment Board upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employees within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Claimants, who occupy various positions within Carrier's Track Subdepartment, were regularly assigned to Section Force 5F14 headquartered at Franklin, Virginia, and each observed a Monday through Friday workweek.

On March 26, 1990, the Senior Manager-Labor Relations served notice to the General Chairman advising:

> "This will serve as notice of Carrier's intent to contract for the repaving of road crossings on the Raleigh/Rocky Mount Seniority District, Florence Division, identified on the attached.
>
> Contract of the foregoing is necessary due to the unavailability of skilled forces and equipment with which the work may be done. Furthermore, as you are well aware, it is and has been the Carrier's position that such work does not accrue to MofW forces and this notice is in keeping with out commitment to you of advice when outside parties are on or near company property.
>
> This notice fully satisfies Carrier's obligations under applicable provisions of Agreements. We have scheduled Tuesday, April 3, 1990, beginning at 9:00 A.M., in this office to discuss this matter further should you so desire."

The Parties did confer on April 3, however, an agreement was not reached, and the Carrier subsequently contracted with E&M Backhoe Services Inc., to perform the repaving work. When the track work was completed by Carrier forces on the Portsmouth Subdivision, the Carrier purchased asphalt from E&M, whose employees paved the prepared crossings and approaches leading to the track structure.

On September 7, 1990, the Organization submitted a claim asserting:

"Claim is made that the Carrier violated the effective Agreement, when on July 13, 19 and 27, 1990, it allowed or otherwise permitted a Contractor, E&M Services of Dillon, S.C. to perform maintenance work of reconstructing road crossings on the Portsmouth Subdivision of the Florence Division.

* * *

The Claimants named herein were fully qualified, readily available and would have performed the subject work themselves had the Carrier only allowed them to do so. As a result of the Carrier allowing said Contractor to perform this work, the Claimants were deprived of their contractual rights and damaged monetarily due to the loss of work opportunity."

In support of its claim, the Organization submitted 28 statements from Maintenance of Way employees attesting to the fact that the work in dispute had "historically and exclusively" accrued to them.

Further, according to the General Chairman, the Carrier had entered into an Agreement with E&M on March 19, 1990 to perform the work in dispute one week before advising the Organization of its intent to contract out the work at issue on March 26, 1990. That constitutes "blatant bad faith bargaining," according to the Organization.

The Carrier denied the claim maintaining that it had complied with Rule 2 of the Agreement when it sent the March 26, 1990 Notice to the General Chairman, and then conferred with him at the April 3 conference. The Carrier further maintained that the asphalt paving of highway road crossings did not come under the scope of

maintenance of way work, nor has it exclusively been performed by the Maintenance of Way employees. While the Carrier conceded that its original contract with E&M was signed a week before it gave notice to the General Chairman, it insisted that it had not engaged in "bad faith bargaining." The Carrier maintained that it had relied upon Paragraph 8 of that Agreement which contained a "cancellation clause," when it originally entered into the contracting agreement. Additionally, the Carrier noted that the work did not commence until "well after" the notice of intent and conference.

The language contained in Rule 2 of the Agreement is clear and unambiguous with respect to the contracting out of work. In pertinent part, Rule 2 states that in circumstances under which the Carrier intends to contract out work it must "confer with the General Chairman and reach an understanding setting forth the conditions under which the work will be performed." There is no dispute that the Carrier signed an Agreement with E&M to perform the disputed work on March 19, 1990, seven days prior to informing the General Chairman that it intended to contract out the work. Providing pro forma notice and consultation of a fait accompli is not compliance with the letter or the spirit of Rule 2 or with the "good faith efforts" promised in the "Hopkins/Berge Letter" of December 11, 1981. Based on the undisputed facts concerning the Carrier's failure to provide timely good faith notice, this claim must be sustained, without expressing or implying any opinion concerning its underlying merits.

AWARD

Claim sustained in accordance with the Findings.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 4th day of March 1997.